

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

JONATHAN A. BLOOM,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 5:16-cv-121
)	
SYLVIA BURWELL ¹ in her official capacity)	
As Secretary, United States Department)	
Of Health and Human Services,)	
)	
Defendant.)	

MOTION FOR EXTENSION OF TIME TO ANSWER AMENDED COMPLAINT

Upon the following memorandum of points and authorities and the Declaration of Eric J. Lester, filed herewith as Exhibit A, the Defendant, Sylvia Burwell, Secretary of the United States Department of Health and Human Services ("the Secretary"), by her attorney, Eugenia A.P. Cowles, Acting United States Attorney for the District of Vermont, hereby requests a fifty-two (52) day extension of time to respond to Plaintiff Jonathan A. Bloom's Amended Complaint. The Secretary's response and the new Administrative Record required by the filing of the Amended Complaint, would be filed by April 10, 2016. In support of this motion, the Secretary submits the following:

1. On May 9, 2016, the United States Attorney's Office for the District of Vermont was served with the Summons and Complaint. The Complaint seeks judicial review pursuant to 42

¹ Pursuant to Rule 25 (d) of the Federal Rules of Civil Procedure, Thomas E. Price, M.D. should be substituted for Sylvia M. Burwell, in his official capacity as the Secretary of the U.S. Department of Health and Human Services.

U.S.C. § 405(g) of two adverse decisions of the Medicare Appeals Council: Docket No. M-15-4332, dated February 24, 2016 and Docket No. M-15-1505, dated November 13, 2016.

2. Unlike the typical appeal under Section 405(g), involving a single request for judicial review of a single adverse decision, the Plaintiff sought review of two separate agency decisions, each based on separate evidence presented in a separate Administrative Record (AR).

3. After receiving an extension of time to respond to the Complaint, the Secretary filed a motion for voluntary remand pursuant to Sentence 6 of 42 U.S.C. § 405(g).

4. Following briefing and a hearing on the motion, the Court requested the Secretary to file the two Administrative Records with respect to the two adverse decisions under review. The Secretary filed the ARs and the Court thereafter denied the Secretary's motion for voluntary remand on January 17, 2017.

5. On January 20, 2017, the undersigned contacted Plaintiff's counsel to propose a briefing schedule consistent with this Court's usual scheduling of appeals under Section 405(g), as outlined in this Court's Local Rule No. 9. The Secretary advised that she would be filing her Answer to the Complaint on or before February 16, 2017. Counsel for Plaintiff advised that she preferred to rely on the timing outlined in the local rule and that a scheduling order was not necessary. Counsel for Plaintiff said nothing about the possibility of filing an Amended Complaint.

6. On Friday, February 3, 2017, Plaintiff filed an Amended Complaint pursuant to F.R.Civ.P. 15, as of right before the Secretary filed her Answer.²

² Because Plaintiff did not need to file a motion to amend, Local Rule No. 15 did not require Plaintiff to file a redlined copy of the Amended Complaint. Upon request, Local Counsel provided a redlined copy to counsel for the Secretary as a courtesy on February 8, 2017.

7. The Amended Complaint seeks, *inter alia*, judicial review of yet a third, more recent, adverse decision issued by the Secretary denying payment of benefits for the Plaintiff's CGMs, dated January 27, 2017. This decision is based on a separate AR that has not yet been gathered, compiled or certified by the Secretary. Judicial review of this new decision would normally be the subject of its own complaint, which would allow the Secretary sixty (60) days to prepare its response and file the AR. Rather than filing a new Complaint, Plaintiff has amended the current Complaint to seek judicial review of the latest adverse decision.

8. At no time did counsel for the Plaintiff advise the Secretary that she intended to amend the Complaint to seek judicial review of a new and more recent third adverse decision, thus the Secretary has had no previous opportunity to prepare the AR or to contemplate her response to the Amended Complaint.

9. Because each adverse decision must be viewed in isolation with the AR supporting the decision, the undersigned will not have the opportunity to review or consider the AR upon which the third adverse decision is based until after the AR is gathered, compiled and certified.

10. F.R. Civ.P. 15(a)(3) establishes the time within which a party must respond to an amended pleading, and provides:

Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

11. Therefore, F.R.Civ.P. 15 requires the Secretary to file its response to the Amended Complaint within fourteen (14) days after service, or by February 17, 2017.

12. The Secretary is unable to prepare the AR before the February 17, 2017 response deadline. *See* Exhibit A, Declaration of Eric J. Lester. The Secretary requires at least sixty days

to prepare the AR, certify its contents and transmit the AR to the United States Attorney's Office for filing. The AR will not be available until approximately April 4, 2016. Exhibit A, paragraph 6.

13. After preparation and receipt of the new AR supporting the third adverse decision added by the Amended Complaint, the undersigned needs additional time to review the AR and confer with agency counsel concerning its options in responding to the allegations in the Amended Complaint concerning the third adverse decision before submitting the Secretary's response to the Amended Complaint. The Secretary's response may differ depending on the contents of the AR.

14. The Secretary therefore requests a fifty-two (52) day extension of time to gather, assemble and certify the AR, to review the AR, and to prepare her response to the Amended Complaint. The new deadline would be April 10, 2017.

15. This additional time would also give the Secretary the full sixty (60) days to which she would otherwise be entitled in which to respond to any new Complaint seeking judicial review pursuant to Section 405(g). *See* F.R.Civ.P. 12(a)(2) (giving the United States 60 days to file an answer to a complaint served on an agency or employee sued only in an official capacity); *See also* Vt. Local Rule No. 9 (allowing sixty (60) days for the filing of the Government's answer and AR in all actions seeking judicial review pursuant to Section 405).³

³ Although Vt. Local Rule No. 9 makes reference only to decisions of "the Commissioner of Social Security," this rule should likewise be applicable to decisions of the Secretary of Health and Human Services. The Medicare Statute, 42 U.S.C. § 1395ff(b)(1)(A), makes the Social Security Act applicable to judicial review of decisions by the Secretary. Section 405, which is specifically referenced in Vt. Local Rule No. 9, is the exclusive remedy for any challenge to a decision of the Secretary. Furthermore, by practice in this District, Vt. Local Rule No. 9 governs the schedule of litigation filings in lawsuits challenging by the Secretary of Health and Human Services.

16. Plaintiff's consent for an extension of time was sought but Plaintiff declined to agree to this motion.⁴

WHEREFORE, the Secretary respectfully requests that this motion for extension of time be GRANTED and that the Secretary be permitted to file the AR for the third adverse decision and her answer or other response to the Amended Complaint on or before April 10, 2017.

Dated at Burlington, in the District of Vermont, this 15th day of February, 2017.

Respectfully submitted,

SYLVIA BURWELL,
Secretary of Health and
Human Services

EUGENIA A.P. COWLES
Acting United States Attorney

By: /s/ *Melissa A. D. Ranaldo*

MELISSA A.D. RANALDO
Assistant U.S. Attorney
P.O. Box 570
Burlington, VT 05402-0570
(802) 951-6725
Melissa.Ranaldo@usdoj.gov

⁴ Plaintiff would only consent to a fourteen (14) day extension of time -- to March 3, 2017.

Of Counsel:

MARGARET M. DOTZEL
Acting General Counsel

JAN B. BROWN
Acting Chief Counsel, Region I

JILL STEINBERG
Assistant Regional Counsel
Department of Health and Human Services
J.F.K. Bldg., Rm. 2250
Boston, MA 02203
617-565-2391
Jill.Steinberg@hhs.gov